

## NEWSLETTERS

### Legal Rights Of Fraternities And Sororities As Single-Sex Organizations

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Fraternities' and sororities' rights to remain single-sex organizations are front and center in the current legislative session. With the 2018 version of the Higher Education Reauthorization Act pending in Congress, there is some question of what protections, if any, this act, called the Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act, will give to fraternities and sororities. As of the date of this article, it appears the act currently provides protections for fraternities and sororities to remain single-sex organizations by prohibiting universities from discriminating against these groups. Assuming this remains, it will certainly be a big win for all single-sex organizations.

Further, Harvard's highly debated policy also brings into question the landscape for single-sex organizations. Harvard's policy has evolved somewhat since it was first announced. However, the most recent version appears to bar members of single-sex organizations from different leadership positions, athletic teams, and certain scholarships. This is obviously a concern for fraternities and sororities on campus.

Finally, even within the country's highest court, there have been some decisions that have appeared to limit, in some way, fraternities' and sororities' rights to remain single-sex organizations. Namely, in *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010), the U.S. Supreme Court's footnote gives some reason for pause. Specifically, the court said that an unrecognized fraternity may be "able to grow despite severed ties with the University of New Hampshire," citing an article in *The New Hampshire* titled "Baker, Despite Lack of University Recognition, Pi Kappa Theta Continues to Grow" to support its proposition. This footnote was in response to Christian Legal Society's (CLS) argument that, if a university prohibits groups with a particular membership makeup, those groups would be forced to be "unrecognized" from the university, and would have to survive on their own with no university recognition. This, CLS argued, would likely result in the group's ultimate demise. As shown by the court's footnote, it disagreed with that argument.

There is still some support for fraternities and sororities to remain single-sex organizations, mostly centered on fraternities' and sororities' role as values-based organizations. The U.S. Supreme Court has before declined to require private organizations to take certain members whose values, according to the organization, went against their own values. The Supreme Court has felt that requiring a private organization to take

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certain members would be a compulsory membership standard and violate the group's freedom to associate. In this way, focusing on fraternities and sororities as values based organizations (specifically, ones that promote brotherhood and sisterhood, respectively) may help fraternities and sororities maintain their single-sex status.

Finally, fraternities and sororities could help promote their cause by asking their members to maintain their recruiting efforts with only their members, and prohibit any sort of "auxiliary membership" roles. In 1984, the U.S. Supreme Court prohibited the Jaycees from limiting their membership to males-only for several reasons, including that they allowed women to assist in recruiting efforts, and allowed other limited membership roles for women. In other words, the Jaycees allowed the participation of "strangers" to their organization, and failed to demonstrate that the state non-discrimination act compromised the organizations' right in protected speech to remain a single-sex organization. Arguably, the more the opposite sex is involved in these organizations, the harder it will be for fraternities and sororities to argue the single-sex status is important to their organization.

Fraternities and sororities certainly have some reason to wonder what the future membership of their organizations may look like. While there are certainly some questions, there also appear to be some answers.

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